

STATE OF MICHIGAN
COURT OF APPEALS

CAROLINE RITCHIE,

Plaintiff-Appellant,

v

HONIGMAN, MILLER, SCHWARTZ AND
COHN,

Defendant-Appellee.

UNPUBLISHED
October 24, 2000

No. 211562
Wayne Circuit Court
LC No. 97-709460-CZ

Before: Collins, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

This is an age discrimination case in which plaintiff, a secretary for defendant law firm, claims that she was initially demoted from her secretarial position with an attorney in the law firm to a floating pool, and later terminated from her job. Plaintiff was hired on July 12, 1976, at the age of forty-six and had fifteen years of secretarial experience. She worked for the same lawyer in the law firm for over ten years. In May of 1992, plaintiff was assigned to the secretarial pool, where she remained for nearly a year. From April 30, 1993, until September 16, 1994, plaintiff was assigned to work for defendant's ethics committee under Patricia McKanna. McKanna, however, recommended that plaintiff be placed on probation on June 6, 1994, and then recommended that plaintiff be removed from her position on September 16, 1994, because of poor performance. Plaintiff then returned to the secretarial pool.

Also in 1994, defendant changed its computer system and all secretaries participated in several days of training and were required to pass a skills assessment test after the training. Plaintiff did not pass the first test taken on July 25, 1994. After the examination, a computer trainer reviewed the material with plaintiff to retake the assessment test; however, plaintiff apparently declined to be retested. Plaintiff subsequently was terminated by defendant on January 31, 1995, at the age of sixty-four.

Plaintiff filed her complaint on March 28, 1997, and defendant subsequently moved for partial summary disposition. Defendant's contention was that the events that occurred before March 28,

1994, were barred by the three-year statute of limitations. The trial court granted the motion, but reserved ruling on whether these incidents were admissible as evidence, even if not the basis for a claim of discrimination. Defendant later filed another motion for summary disposition, arguing that plaintiff could not overcome defendant's assertion that she was terminated based on poor job performance. The trial court granted the motion in an order dated April 16, 1998.

We review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Maiden, supra*, p 119. In evaluating a motion brought under MCR 2.116(C)(10), the court is to consider the pleadings, affidavits, admissions, depositions, and any other evidence filed or submitted by the parties, MCR 2.116(G)(5), to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

We initially note that although plaintiff claims that her alleged demotion to the secretarial pool in May 1992 was an adverse employment action, the trial court dismissed this allegation on the basis of the three-year period of limitation. MCL 600.5805(9); MSA 27A.5805(9); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1992). Although plaintiff does not directly attack this ruling, there is no question that her termination occurred within the three-year period because the complaint was filed on March 28, 1997, and she was terminated on January 31, 1995. Consequently, we will focus on her termination as the adverse employment action, and acknowledge that the actions occurring before the statutory limitation period may be considered under the continuing violation theory set forth in *Sumner v Goodyear Co*, 427 Mich 505; 398 NW2d 368 (1986).

To prove a claim of age discrimination, a plaintiff must show "by a preponderance of the evidence, that (1) she was a member of the protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was replaced by a younger person." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). Once these elements are shown, the burden shifts to the defendant to establish a "legitimate, nondiscriminatory reason" for the termination. *Id.*, p 173.

A prima facie claim of discrimination may be established by a plaintiff's well-pleaded complaint and a legitimate, nondiscriminatory reason may be articulated in a defendant's motion for summary disposition. *Id.* In establishing the reason for its decision to demote or discharge a plaintiff, the defendant must set forth, through admissible evidence, the reasons for the adverse employment decision, and the reasons must be legally sufficient to justify judgment for the defendant. *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999).

The burden then shifts back to the plaintiff to show, by a preponderance of the evidence, "that there is a triable issue of fact that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." *Lytle, supra*, p 174. A plaintiff may establish that the defendant's reasons were pretextual, "(1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the

reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision.” *Meagher v Wayne State Univ*, 222 Mich App 700, 711-712; 565 NW2d 401 (1997).

In her complaint, plaintiff indicated she was between forty and seventy years old at the time of the alleged discrimination, establishing that she was a member of a protected class. Plaintiff also established that she was terminated, which constituted an adverse employment action. Plaintiff further indicated she was qualified for the position of secretary, based on her “satisfactory or above” work performance. Plaintiff did not assert that she was replaced by a younger person after her termination, but maintained that she was treated differently than other, younger employees.

Defendant articulated legitimate, nondiscriminatory reasons for plaintiff’s termination, including poor job performance, her failure to pass the computer skills assessment test, and the elimination of the secretarial pool. Plaintiff, however, has failed to rebut this reason. First, plaintiff testified that she was informed on November 20, 1994, that the floating secretarial pool would be eliminated for economic reasons. Defendant presented evidence that other floating secretaries, some of whom were in plaintiff’s protected class, were reassigned, laid off, or terminated after the pool was eliminated. Defendant also presented evidence that plaintiff was required to pass the computer skills assessment test and that plaintiff was trained on the new computer system in the same manner as other secretaries, that she was given an extension to prepare for the test, that she failed the skills assessment test, that she was given additional one-on-one training, but that she refused to retake the test. Further, defendant presented evidence that plaintiff had access to and practiced on a computer to prepare for the test. Finally, defendant presented evidence that plaintiff’s job performance was poor.

Accordingly, defendant carried its burden of articulating, through competent evidence, legitimate, nondiscriminatory reasons for plaintiff’s termination. To rebut this evidence, plaintiff introduced work evaluations in which she was rated from fair to excellent as a floating secretary. Also, plaintiff presented deposition testimony in which she stated that she was not given her own computer with the new software until two weeks after her computer training. However, plaintiff also acknowledged that she, and every other secretary, was required to take and pass the test as a job requirement. Plaintiff also introduced evidence that she refused to retake the test because she thought she did not have enough practice on the new system.

This evidence was insufficient to rebut defendant’s legitimate, nondiscriminatory reasons for plaintiff’s termination. To carry her burden of proof, plaintiff was required to show that defendant’s reasons were pretext and that discrimination was a motivating factor behind her termination. *Lytle, supra*, pp 175-176. To prove that the skills assessment was a mere pretext, plaintiff had to show that she was treated differently from similarly situated employees. *Id.*, p 178. Although plaintiff presented evidence that she did not receive a computer immediately after her training and that she felt unprepared for the test, she did not present a triable issue that she was treated differently or that she received less training than other younger, floating secretaries. Further, plaintiff failed to present evidence that younger, floating secretaries who failed the assessment test were given more time or more follow-up training to retake the test or that others who refused to retake the test were allowed to remain at the firm.

Plaintiff also failed to present evidence “sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.” *Lytle, supra*, p 176. In fact, plaintiff presented no evidence that would raise an inference that she was treated differently based on her age or that she was terminated because of her age. Plaintiff’s mere assertion that she felt she was “treated in a manner where [she] was kind of set up not to do well” was insufficient to create a genuine issue of material fact to show age discrimination and does not constitute competent evidence that age was an underlying factor in the adverse employment action.

In addition, plaintiff failed to show that the workforce reduction, through the elimination of the secretarial pool, was a pretext for age discrimination. Plaintiff did not present evidence to show that this reason had no basis in fact, that the reduction was not really a factor motivating her termination, or that the elimination of the pool was an insufficient reason to justify her termination. *Meagher, supra*, pp 711-712. Further, plaintiff presented no evidence that other, younger members of the floating pool were treated differently or remained in their positions after the pool was eliminated. Thus, plaintiff failed to rebut defendant’s legitimate reason in this regard.

Accordingly, the trial court did not err in granting defendant’s motion for summary disposition.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Michael J. Talbot